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# INDEPENDENT ETHICS COMMISSION



FEBRUARY 2016

PERFORMANCE AUDIT

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# OFFICE OF THE STATE AUDITOR



February 29, 2016

DIANNE E. RAY, CPA  
—  
STATE AUDITOR

Members of the Legislative Audit Committee:

This report contains the results of a performance audit of the Independent Ethics Commission. The audit was conducted pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of state government. The report presents our findings, conclusions, and recommendations, and the responses of the Independent Ethics Commission.

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# REPORT HIGHLIGHTS



INDEPENDENT ETHICS COMMISSION  
PERFORMANCE AUDIT, FEBRUARY 2016

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## CONCERN

The Independent Ethics Commission (IEC) could improve its procedures for ensuring that parties to ethics complaints are adequately informed of how to file complaints as well as the standards of conduct being considered at hearings and the basis of the IEC's decision to dismiss complaints as frivolous. Additionally, the IEC lacks adequate, written policies and procedures in several areas, including document retention, conflicts of interest, and staff administration.

## KEY FINDINGS

- Individuals who file complaints with the IEC, known as complainants, are not adequately informed of how to file complaints, leading to the filing of incomplete complaints. Specifically, 86 percent of the complaints that were filed between January 2012 and June 2015, and for which the IEC had retained documentation, did not comply with the IEC's rule requiring a signed statement that the alleged facts and allegations were true; 33 percent of such complaint filings lacked key information, such as the date of the alleged violation and the ethical standards violated; and 61 percent of such complaints requested remedies that the IEC cannot provide, such as removal from office or reversal of agency decisions.
- The IEC lacks clear guidance for its staff on the content and scope of investigative reports and the methods to be used for notifying parties of the standards of conduct that will be considered at hearings and documenting this notice.
- The IEC did not retain one or more key documents for 25 of the 53 complaints that were filed between January 2012 and June 2015 and did not maintain audio recordings of the hearings for 43 of the 53 complaints. The IEC's Records Management Policy was not approved by the State Archives as required.
- The IEC did not have a written policy regarding conflicts of interest and the circumstances under which commissioners, the IEC Director, or the IEC's Attorney General's Office representative should recuse themselves from proceedings.
- There may be opportunities for the IEC to evaluate and pursue policy changes that could increase its effectiveness by providing additional support to complainants, increasing the transparency of its process for dismissing complaints as frivolous, and clarifying its rules of procedure.

## BACKGROUND

- The IEC was created by a 2006 voter-initiated amendment to the State Constitution, commonly known as "Amendment 41."
- The IEC is responsible for hearing ethics complaints filed by citizens against state and local government employees and officials; providing ethics advice through advisory opinions, letter rulings, and position statements; and providing ethics training.
- From Calendar Year 2012 through 2015, the IEC ruled on 57 complaints and found that an ethics violation occurred for four of these complaints. In addition, during the same period, the IEC issued 48 advisory opinions, five letter rulings, and one position statement.
- In Fiscal Year 2016 the IEC was appropriated about \$350,000 in general funds and had one full-time employee.

## KEY RECOMMENDATIONS

- Improve the complaint process by revising the complaint form and improving the instructions provided to the public on filing a complaint.
- Establish procedures to ensure that staff have clear guidance regarding the scope and content of investigative reports and that parties to complaints receive notice of the ethical standards the IEC plans to consider at hearings and that this notice is documented.
- Establish written policies for records retention, conflicts of interest, and staff administration in accordance with applicable laws.
- Consider changes to provide complainants with additional support and to increase the transparency of the process for dismissing frivolous complaints.





# CHAPTER 1

## OVERVIEW

The Independent Ethics Commission (IEC) was created by a 2006 voter-initiated amendment to the State Constitution commonly known as “Amendment 41” and codified in Article 29 of the Colorado Constitution (Article 29). According to its 2013-2015 IEC Handbook, the IEC’s purpose is to advance an ethical culture and increase awareness of ethical issues in state and local government by hearing ethics complaints against state and local government officials and employees, issuing ethics advice, and providing training.

Although administratively housed within the Judicial Branch, the IEC operates as an independent entity within state government. The IEC is composed of five appointed commissioners, one appointed by each of the following: (1) the Colorado House of Representatives, (2) the Colorado Senate, (3) the Governor, (4) the Chief Justice of the Colorado Supreme Court, and (5) the IEC itself (this commissioner must be a local government employee or elected official). Commissioners are appointed to 4-year terms and may be reappointed. No more than two commissioners may be registered to the same political party. IEC commissioners are unpaid and conduct their duties for the IEC on a part-time basis. Therefore, the day-to-day administration of the IEC is performed by IEC staff, which during the audit consisted of a single full-time employee hired to serve as the Director. In Fiscal Year 2016 the IEC was appropriated about \$350,000 in general funds.

## IEC JURISDICTION

Article 29 generally provides the IEC with authority over all state and local government employees and officials. These employees and officials are known as “covered individuals.” However, Article 29 excludes several groups of individuals from its provisions:

- Judges and Judicial Branch employees.
- Unpaid members of boards and commissions.
- Employees and officials of home-rule jurisdictions that have established their own ethics codes or ordinances that address the matters covered by Article 29.
- Employees and officials of local districts, such as school and parks and recreation districts.

In addition, Article 29 does not provide the IEC with authority to hear complaints or issue advice regarding ethical matters that occur outside of state and local government. Thus, it does not have jurisdiction over

allegations of unethical practices by private businesses, regulated professionals, or other private entities and individuals.

Article 29 establishes specific ethical requirements for covered individuals and provides the IEC authority to hear complaints and provide advice in several areas. First, Article 29, Section 3 establishes a gift ban generally prohibiting covered individuals from accepting money or any item valued at \$59 or more in any calendar year (the amount is adjusted every 4 years for inflation), and provides the IEC with authority to enforce this requirement by hearing complaints of alleged violations and issuing fines up to double the amount improperly received. To clarify what types of transactions are considered gifts under Article 29, the IEC has issued position statements, which are official written statements that provide the IEC's interpretation of ethics laws, and has provided further guidance on its website and in its IEC Handbook.

Second, Article 29, Section 4, restricts elected officeholders and members of the General Assembly from acting as paid lobbyists for a period of 2 years after they leave office. According to a position statement issued by the IEC, this restriction on lobbying includes former elected officials serving as legislative liaisons for state agencies. The IEC is responsible for hearing alleged violations of this requirement.

Third, in addition to its enforcement of the gift ban and restrictions on lobbying, Article 29 provides that the IEC has authority to hear ethics complaints regarding "any other standards of conduct and reporting requirements as provided by law." Although Article 29 does not provide any further definition of the IEC's authority, according to the Director, IEC Handbook and website, the IEC has interpreted this provision to generally include:

- Conflicts of interest due to a covered individual having a personal or financial interest in a matter in which they are involved in their official capacity. Requirements related to such conflicts are provided in Section 24-18-101 et seq., C.R.S.

- Misuse of public resources.
- Improper disclosure of confidential information.
- Filing false or incomplete reports.

By contrast, the IEC generally does not hear complaints related to alleged violations of election law, attorney misconduct, or manager-employee disputes. Although the IEC does hear complaints of ethical violations that are also violations of criminal law, the IEC does not have jurisdiction over criminal statutes and its practice has been to stay such complaints until any related criminal proceeding has concluded.

## ETHICS COMPLAINTS

Article 29, Section 5, requires the IEC to conduct an investigation, hold a public hearing, and render findings on each non-frivolous complaint it receives. The first step in the complaint process is for an individual, known as a “complainant” to file a complaint with the IEC using its complaint form. The complainant is required to provide the name of the person who committed the alleged violation, known as the respondent; explain the facts and circumstances of the alleged violation; provide applicable standards of conduct that are alleged to have been violated; and submit any relevant evidence, such as public meeting records, correspondence, financial records, media accounts, or other documentation, supporting the complaint. Under Article 29, Section 5, complaints must be filed within 1 year of the date of the alleged violation.

Once the IEC receives a complaint it must determine whether it is frivolous or non-frivolous under Article 29 and IEC Rules. IEC Rules define a frivolous complaint as “a complaint filed without a rational argument for the IEC’s involvement based on the facts or law” and the IEC’s practice has been to treat all complaints that lack a rational argument that an ethical violation occurred, as outside of its

jurisdiction, or are untimely, as frivolous. If the IEC rules a complaint to be frivolous, it dismisses the complaint without any further investigation and sends a letter to the complainant informing him or her of the dismissal. Under Article 29, the IEC must maintain the confidentiality of complaints it rules as frivolous.

If the IEC finds a complaint to be non-frivolous, it must inform the parties to the complaint, provide the respondent with an opportunity to provide a response and evidence, conduct an investigation, hold a public hearing, and rule on whether or not an ethical violation occurred. Both the complainant and respondent may be represented by legal counsel throughout the complaint process, but this is not required. If the IEC finds that a violation occurred, Article 29 authorizes it to fine the respondent up to twice the value of any benefit that he or she improperly received. Records related to non-frivolous complaints are open for public review and posted on the IEC website. EXHIBIT 1.1 shows the total number of complaints received by the IEC during Calendar Years 2012 through 2015 and on which the IEC had ruled as of January 2016.

EXHIBIT 1.1. IEC COMPLAINTS CALENDAR YEAR 2012 THROUGH 2015					
RULING	2012	2013	2014	2015 <sup>1</sup>	TOTAL
Frivolous	5	12	22	11	50
Non-frivolous	2	2	1	2	7
Violation	1	0	1	2	4
No Violation	1	2	0	0	3
<b>TOTAL</b>	<b>7</b>	<b>14</b>	<b>23</b>	<b>13</b>	<b>57</b>

SOURCE: Office of the State Auditor's Review of Independent Ethics Commission data.  
<sup>1</sup> Includes all complaints with rulings as of January 3, 2016. Complaints filed prior to December, 31, 2015, but for which no ruling had been made as of January 3, 2016 are not included in the totals.

## ADVICE

Article 29 and Section 24-18.5-101, C.R.S., require the IEC to issue written advisory opinions and letter rulings, upon request, to provide guidance on whether conduct would be a violation of applicable ethics laws. Both covered and non-covered individuals can request formal

advice from the IEC, with advisory opinions being issued to covered individuals and letter rulings being issued to non-covered individuals. If, either through an advisory opinion or letter ruling, the IEC determines that the activities described in the request for advice would not violate any ethical standards, it holds the relevant parties harmless from any future complaints that could be filed related to the specific activities described in the request.

In addition, the IEC provides formal advice through position statements, which it issues at its discretion. Position statements generally provide an explanation of the IEC's interpretation of ethics laws to clarify the standards that apply to covered individuals. From Calendar Year 2012 through 2015, the IEC issued 48 advisory opinions, five letter rulings, and one position statement.

In addition to providing formal advice, the IEC Director provides informal guidance to covered individuals and the public through trainings offered to state and local government agencies, and by responding to phone calls and emails from individuals with questions regarding the state's ethics laws and the IEC's operations. Although IEC Rules prohibit the Director from providing legal advice, this informal guidance helps individuals to better understand the IEC's application of Article 29 and other ethical standards of conduct, and the process for filing a complaint or request for formal advice. In addition, through phone calls, individuals are able to request guidance anonymously, which is not allowed if they seek formal advice.

## AUDIT PURPOSE, SCOPE AND METHODOLOGY

This report includes the results of our performance audit of the Independent Ethics Commission. We conducted this audit pursuant to Section 2-3-103, C.R.S., which authorizes the State Auditor to conduct audits of all departments, institutions, and agencies of state government. The audit was prompted by a legislative request which expressed concerns regarding the IEC's processes for ensuring that

complaints are handled consistently and in accordance with Article 29 and IEC Rules. Audit work was performed from July 2015 through January 2016.

We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained does provide a reasonable basis for our findings and conclusions based on our audit objectives.

We planned our audit work to assess the effectiveness of those internal controls that were significant to our audit objectives. Our conclusions on the effectiveness of those controls are described in the audit findings and recommendations. The key objectives of the audit were to evaluate the extent to which the IEC's policies, procedures, and practices are consistent and in accordance with applicable laws in the following areas:

- Reviewing complaints and deciding whether complaints are frivolous.
- Investigating and hearing non-frivolous complaints.
- Providing advisory opinions, letter rulings, and position statements.

In addition, we evaluated the extent to which IEC staff provide consistent and accurate information without providing legal advice when the IEC receives requests for information. We also evaluated whether the IEC has been effective at achieving the intent of Article 29 and its purpose to increase awareness of ethics laws among public officials and employees and advance an ethical culture throughout state and local government.

To accomplish our objectives, we:

- Reviewed laws and rules governing the IEC’s operations, including the Colorado Constitution, statutes, and IEC rules.
- Interviewed the IEC Director at the time of the audit, one former Director, and all five IEC commissioners to gain an understanding of the IEC’s practices for handling complaints and requests for advice, and on the overall mission of the IEC.
- Reviewed guidance to the public provided on the IEC’s website and in its 2013-2015 IEC Handbook.
- Reviewed all 53 complaints filed and processed by the IEC from January 2012 through June 2015. For each complaint, we reviewed all supporting documents available in the IEC’s files. Documents in the files varied but generally included a combination of complaint forms, evidence submitted by the complainant and respondent, correspondence between the parties and the IEC, responses to complaints, investigative reports, notices of hearings, and IEC final orders. In addition, we reviewed IEC final decisions posted on its website and recorded in its meeting minutes.
- Reviewed all 24 requests for advisory opinions and letter rulings issued by the IEC during Fiscal Year 2015. For each request we reviewed all supporting documentation available in the IEC’s files. Documents in the files varied but generally included a combination of the request submission, correspondence between the IEC and the requestor, documentation submitted by the requestor, and the final advisory opinion or letter ruling issued by the IEC.
- Reviewed the practices of all 42 states with ethics commissions based on National Conference of State Legislatures data, and conducted a more detailed review of a judgmental sample of 11 state and local ethics commissions selected to provide representation of ethics commissions with a similar size and scope



of authority as the IEC. We compared the practices of these other commissions to the IEC's practices.

## SCOPE LIMITATION

Government Auditing Standards require that we report limitations on the evidence used during an audit if the evidence is significant to the audit's findings and conclusions. During the audit we were limited in our ability to review the IEC's process for hearing ethics complaints due to the IEC not having complete complaint records. Specifically, the IEC lacked documentation of key parts of the complaint process for 25 of the 53 complaints included in our review period, and lacked audio recordings of the proceedings for 43 of the complaints. Therefore, although we were able to review the IEC's complaint process to identify inconsistencies and control weaknesses in the process based on the records available, we could not reliably conclude on the overall consistency of the process or determine whether the IEC complies with applicable laws and rules for all complaints included in our review.



# CHAPTER 2

## COMPLAINTS AND REQUESTS FOR ADVICE

The Independent Ethics Commission's (IEC)'s core functions are hearing complaints and responding to requests for advice as provided by Article 29 of the State Constitution (Article 29). Through its administration of each of these processes, the IEC enforces the requirements of Article 29 and provides covered individuals with guidance to ensure that they act in accordance with the State's ethics laws. Therefore, the IEC needs to have adequate policies and procedures to ensure that these processes are accessible, consistent, and conducted in accordance with applicable laws to fulfil its constitutional purpose.

During the audit we reviewed the IEC’s complaints and advisory opinion processes from initial filing through to the IEC’s final decision. As discussed in the following sections, we found that the IEC could improve the information it provides to the public regarding each process, and identified several areas where the IEC could strengthen its rules, policies, and procedures to ensure that its practices are consistent from one complaint to the next, that commissioners avoid conflicts of interest, and that records of complaints are properly retained.

## FILING OF COMPLAINTS AND REQUESTS FOR ADVICE

For individuals seeking to file a complaint with the IEC the first step in the process is to complete the IEC complaint form and submit it to the IEC along with any relevant evidence supporting the complaint. At the time of our audit, the form required the complainant to provide (1) his or her name and contact information, (2) the respondent’s name and contact information, (3) an explanation of the alleged violation and relevant facts, (4) the remedy sought by the complainant, and (5) the dated signature of the complainant acknowledging that he or she will cooperate in the complaint and appear at any hearing if the complaint is set for hearing. Although complainants are responsible for gathering relevant information and evidence to support their complaints, the IEC Director often assists complainants to ensure that they submit information sufficient for the IEC to understand the basis of their complaint and make an initial determination on whether the complaint is frivolous or non-frivolous.

Individuals who would like to ask the IEC for an opinion on whether current or future activities are allowable under the State’s ethics laws can request that the IEC provide an advisory opinion (if they are a

public officer or employee), or letter ruling (if they are not a public officer or employee). The IEC does not have an official form for advisory opinion and letter ruling requests, and only requires that the requestor submit a letter or email to the IEC outlining the ethical question and the related facts and circumstances. Similar to complaints, the IEC Director often assists individuals making requests for advisory opinions and letter rulings by informing them of the basic information the IEC will need, and requesting additional information if necessary to ensure that the IEC will have sufficient information to consider the request.

## WHAT WAS THE PURPOSE OF THE AUDIT WORK AND WHAT WORK WAS PERFORMED?

The purpose of our work was to determine whether the IEC complied with applicable law and IEC Rules for accepting complaints and requests for advice, and provided the public with adequate information and instructions to facilitate the filing of complaints and requests for advice. We reviewed all 36 available complaint forms submitted by complainants from January 2012 through June 2015 (the IEC did not have the complaint forms for the other 17 complaints filed during this period); reviewed all 24 advisory opinion and letter ruling requests submitted during Fiscal Year 2015; interviewed the IEC Director and commissioners regarding the process; and reviewed IEC Rules, Article 29, filing instructions provided on the IEC's website, and information provided to inform the public about the IEC's operations in the IEC Handbook.

## HOW WERE THE RESULTS OF THE AUDIT WORK MEASURED?

IEC Rules provide several requirements for complaints. Specifically, complaints must:

- Be submitted to the IEC in writing [IEC Rule 7(B)].
- Contain the complainant's name and contact information. Anonymous complaints are not allowed [IEC Rule 7(C)].
- Contain a statement of facts regarding the violation, including the respondent's name and contact information, and the date of the alleged violation [IEC Rule 7(D)].
- Include a signed statement that to the best of the complainant's knowledge the facts and allegations in the complaint are true [IEC Rule 7(D)(4)].
- Be filed within 12 months of the date the alleged violation occurred [IEC Rule 7(G)(3)].

For advisory opinions and letter rulings IEC Rules require that requests be:

- Submitted in writing [IEC Rule 5(C)(1)].
- Fact specific and narrowly framed [IEC Rule 5(C)(1)].
- Signed by the requestor [IEC Rule 5(C)(1)].
- Submitted at least 10 days prior to the next scheduled meeting of the IEC [IEC Rule 5(C)(2)].

For each complaint, advisory opinion, and letter ruling included in our review, we evaluated whether the filing included all required information and what steps the IEC took when filings did not meet the requirements. In addition, because the IEC depends on individuals to provide adequate information regarding their filings, we assessed the instructions and information the IEC provides to the public on how to file and what information is needed by the IEC to make a ruling or provide advice.

## WHAT PROBLEM DID THE AUDIT WORK IDENTIFY?

Overall, we found that individuals who file complaints, advisory opinions, and letter rulings do not always comply with IEC Rules and often do not submit adequate information for the IEC to consider their complaint or request.

First, we identified the following issues related to the IEC's complaint process:

- 31 of the 36 complaints we reviewed (86 percent) lacked a statement that the facts and allegations in the complaint were true as required by IEC Rule 7(D)(4).
- 12 complaints (33 percent) lacked key information. For example, six did not include the date of the alleged violation, nine did not include the ethical standards that were alleged to have been violated, and five did not provide a clear enough description to understand why the respondent was named in the complaint or what action formed the basis of the complaint.
- 22 complaints (61 percent) requested remedies that the IEC cannot provide, such as removal of elected officials from office, reversal of agency actions, and termination of state employees' employment.
- For one complaint in our review, it is not clear that the IEC properly applied its rules related to timeliness. For this complaint, the complainant described multiple alleged violation dates as part of a lengthy narrative, with one occurring within 12 months of the date the complaint was submitted. The IEC website indicates that this complaint was dismissed solely because it was not timely, despite it including one allegation that appeared to be timely. However, we could not determine from the records available whether the IEC ruled the timely allegation to be frivolous on other grounds and did not properly record this on its website, or whether

it overlooked the date of the timely alleged violation because it was included in a lengthy narrative within the complaint.

Second, we identified similar problems related to advisory opinion and letter ruling requests. Specifically:

- 11 of the 24 requests we reviewed (46 percent) initially lacked adequate information for the commission to provide an opinion, such as the value of gifts, information on the parties providing the benefit in question, and other key information on the events or activities in question, requiring the IEC Director to contact the requestors to gather the needed information.
- 13 of the requests (54 percent) were not signed, as required by IEC Rules, and the IEC did not take any action to require these requestors to do so.

## WHY DID THE PROBLEM OCCUR?

We identified several issues that contributed to the problems we identified. First, we found that the IEC could improve its complaint form. Specifically, we found that the form:

- Does not include a statement that the facts and allegations are true to the best of the complainant's knowledge, although rules require complainants to attest to this statement when filing a complaint. For each of the complaints lacking the required statement, the IEC took no action to enforce the requirement and did not dismiss the complaint.
- May mislead complainants by asking what remedies they seek even though the only remedy available to the IEC under Article 29 is issuing fines up to double the amount improperly received by the respondent.
- Does not require complainants to provide the date of the alleged violation. In addition, the IEC does not time-stamp complaints to indicate when the IEC actually received them. Requiring



complainants to note the date of the alleged violation and time-stamping when complaints are received would improve the IEC's ability to review complaints to ensure that they are timely.

As of February 2016, the IEC reported that it was planning to implement a revised form and was seeking public input.

Second, we found that the IEC website lacks clear instructions on filing a complaint and other information that could help complainants prepare their complaint. For example, the IEC website provides limited instructions on filing a complaint under a FAQ section. However, this section does not (1) indicate that the complainant needs to provide the date of the alleged violation, (2) provide an explanation of the IEC's jurisdiction and the information the IEC uses to determine jurisdiction, or (3) indicate that the only remedy that the IEC can issue is a fine of up to double the amount improperly received. Although this information is available elsewhere, such as in other sections of the IEC website, its Handbook, and IEC Rules, it would be easier for complainants to file if all of the necessary information was provided in one place.

Third, according to the IEC Director, the IEC has not required individuals requesting advisory opinions and letter rulings to sign their requests because most requests are received through email, making signatures less convenient for requestors. Further, unlike complaints, there is not a significant risk that requestors will misrepresent the facts of their request. If the facts of the situation they request advice on are materially different than what is represented in their request, they would not be able to rely on the IEC's ruling as a defense against a potential complaint.

Fourth, similar to complaints, we found that the IEC does not provide adequate instructions to the public on how to request advisory opinions and letter rulings. Specifically, the IEC's website provides little information on how to prepare a request or what type of information the IEC needs to consider requests, only asking that requestors submit an email or letter "outlining the facts and issues."

## WHY DOES THIS PROBLEM MATTER?

Overall, the issues we identified make it more difficult for individuals to file complaints and request advice. Of the 36 complainants included in our review, only nine (25 percent) were represented by counsel. Because information about what complainants need to properly prepare a complaint is scattered across various sources, including statutes, IEC Rules, the IEC Handbook, and the IEC website, it may be difficult and time-consuming for unrepresented individuals without legal training to file a complaint that includes all of the necessary information. Further, if complainants do not adequately understand the IEC's complaint process they may make errors that could jeopardize their complaint, such as not complying with IEC Rules or omitting details or evidence that could impact the IEC's determination on their complaint. Finally, there is a risk that if the complaint process is not easy to understand, some potential complainants may decide not to file a complaint due to the time and resources required. These problems are compounded by the fact that although the IEC Director can assist complainants with procedural matters, this assistance is limited because the Director cannot provide legal advice.

In addition, it is important that the IEC enforce its rules so that individuals with business before the IEC can understand the process it intends to follow, its process provides adequate protections to ensure a fair hearing, and that the potential for legal challenges can be minimized. For example, ensuring that complainants sign a statement confirming that the facts and allegations they submit are true to the best of their knowledge helps ensure that complainants understand that they will be accountable for the information they provide and helps protect respondents from complaints which contain allegations that lack a factual basis. Further, based on our review, respondents in three complaints requested that the IEC dismiss the complaint because it lacked the required statement attesting that the facts and allegations were true.

In addition, if the IEC does not plan to enforce the requirement that advisory opinion and letter ruling requestors sign their requests due to

the added burden it may place on requestors, it should revise its rules to eliminate the requirement.

# RECOMMENDATION 1

The Independent Ethics Commission (IEC) should improve its complaint process by:

- A Revising its complaint form to (1) include a place for a complainant to sign, indicating that all the facts and allegations presented are true to the best of the complainant's knowledge; (2) remove language requesting that the complainant identify the remedy he or she is seeking or clearly explain the remedies available; and (3) require the complainant to provide the date of the alleged violations.
- B Implementing a process to date-stamp complaints when received by the IEC.
- C Improving the instructions provided to the public on how to file a complaint, including consolidating key information on the IEC's jurisdiction, requirements for completing the form, the types of evidence needed by the IEC to adequately review the merits of the complaint, and remedies available from the IEC into a single source, such as the IEC website.

# RESPONSE

## INDEPENDENT ETHICS COMMISSION

- A AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.

The Commission agrees with the Audit recommendation; with respect to recommendation 1.A.2. the Commission suggests removing or clearly explaining the remedies available to complainants.

- B AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.

C AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.

**AUDITOR'S NOTE:** The responses above are the complete responses of the Independent Ethics Commission.

## RECOMMENDATION 2

The Independent Ethics Commission (IEC) should improve its process for advisory opinion and letter ruling requests by:

- A Providing more detailed instructions for submitting requests, including guidance on information and documentation commonly needed by the IEC in order to consider requests.
- B Either enforcing the rule requiring request forms be signed, or revising its rules to eliminate the requirement.

## RESPONSE

### INDEPENDENT ETHICS COMMISSION

- A AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.
- B AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.

**AUDITOR'S NOTE:** The responses above are the complete responses of the Independent Ethics Commission.

# COMPLAINTS PROCESS

When a complainant files a complaint with the IEC, the IEC performs an initial review of the complaint to assess whether it is non-frivolous, and thus warrants an investigation and public hearing, or should be dismissed as frivolous. To facilitate the IEC's initial review, the Director provides each commissioner with a copy of the complaint and any evidence submitted by the complainant prior to an initial hearing by the IEC. If the IEC rules a complaint to be frivolous, Article 29 requires the IEC to protect its confidentiality. For this reason, the initial review of the complaint is conducted during an IEC meeting in executive session under the State's Open Meetings Law, which keeps the meeting confidential from both the public and the parties to the complaint.

At the initial review meeting, the IEC Director presents the key information from the complaint, a summary of the laws and ethical standards relevant to the complaint, and any evidence provided by the complainant. The commissioners then discuss the merits of the complaint and attempt to reach a consensus on whether it should be held frivolous or non-frivolous. If the IEC needs more information to make a determination, it can request that the Director perform a preliminary investigation, in which case it would postpone its decision. Otherwise, the IEC will come out of executive session to publicly vote on whether the complaint is frivolous or non-frivolous. If the IEC finds the complaint to be frivolous, the complaint does not proceed, the complainant is notified through a dismissal letter, and all records of the complaint are kept confidential by the IEC. If, based on its initial review, the IEC rules a complaint to be non-frivolous, it will move the complaint forward to its public hearing process.

The first step in the process for hearing non-frivolous complaints is for the IEC to inform the complainant and respondent that the complaint was determined to be non-frivolous. The respondent is provided with a copy of the complaint and has 30 days in which to file a response with the IEC.

In preparation for the hearing, both parties must disclose all of the evidence they intend to use and all witnesses they intend to call upon to support their position at the hearing, and submit this information to the IEC and the opposing party. Based on the complaint and the respondent's response to the complaint, the IEC Director conducts an investigation, during which the Director may seek to verify the evidence provided by the parties, interview witnesses, and review applicable laws. At the conclusion of the investigation, the Director provides a report to the IEC and the parties to the complaint. Although the contents of reports vary, generally they include a summary of the relevant facts of the complaint and may include interviews and a confirmation of the evidence submitted by the parties.

At the hearing, the complainant is responsible for presenting the complaint and the respondent is responsible for presenting his or her defense. In addition, both parties may provide the IEC with written closing arguments. Following the parties' presentations and submittal of written closing arguments, the IEC issues its decision and a written final order providing the reasoning behind its decision. If the IEC determines that an ethics violation occurred, it may fine the respondent up to double the amount it determines was improperly received.

## WHAT WAS THE PURPOSE OF THE AUDIT WORK AND WHAT WORK WAS PERFORMED?

The purpose of our work was to review the IEC's complaints process to determine whether it complies with Article 29, statutes, and IEC Rules. In addition, we assessed whether the process followed was consistent from one complaint to the next. To accomplish our objectives, we reviewed Article 29, statutes, IEC Rules, and available documentation for all 53 complaints received by the IEC from January 2012 through June 2015, including complaint forms, evidence



submitted, correspondence between the IEC and parties to the complaint, meeting recordings, IEC staff notes, meeting minutes, information posted on the IEC's website, and information available through media sources. In addition, we interviewed the IEC Director and all five commissioners regarding the IEC's practices for reviewing complaints.

For 25 of the 53 complaints submitted during our review period (47 percent), we were not able to review one or more key types of documentation, such as complaint forms, evidence submitted, or correspondence between parties, because the IEC had not retained these records. In addition, audio recordings of meetings were only available for 10 of the 53 complaints. Thus, our ability to assess the IEC's process was significantly limited (see RECOMMENDATION 5 for our discussion of the IEC's document retention policy.) Because of this limitation we could not determine whether the IEC complied with applicable law for all complaints it received during our review period, and could only evaluate the consistency of the process it followed for those complaints that were available for review. Despite this limitation we were able to identify inconsistencies in its processes based on the available documentation.

## HOW WERE THE RESULTS MEASURED?

Under Article 29, statute, and IEC Rules, the IEC must:

- **DETERMINE WHETHER THE COMPLAINT IS FRIVOLOUS OR NON-FRIVOLOUS.** According to Article 29, Section 5, the IEC can dismiss any complaint it determines to be frivolous and may do so without conducting a public hearing. According to IEC Rule 3(A)(5), a "frivolous" complaint is defined as a "complaint filed without a rational argument for the IEC's involvement based on the facts or law." IEC Rule 7(G) also provides that the IEC will dismiss a complaint if it is (1) frivolous, (2) is not within the IEC's jurisdiction, or (3) alleges a violation that occurred more than 1 year before the complaint was filed. The IEC's practice is to treat

complaints dismissed for any of the reasons outlined in Rule 7(G) as frivolous.

In addition, statute [Section 24-18.5-101(5)(a), C.R.S.] requires the IEC to dismiss a complaint that does not allege that a covered individual has received “any gift or other thing of value for private gain or personal financial gain.” Section 24-18.5-101(5)(b)(II), C.R.S. defines “private gain” and “personal financial gain” as “any money, forbearance, forgiveness of indebtedness, gift or other thing of value given or offered by a person seeking to influence an official act...”

- **NOTIFY THE RESPONDENT AND ALLOW AN OPPORTUNITY TO RESPOND.** The IEC must advise the respondent of the complaint and of his or her right to file a written response in order to explain or rebut the allegations made in the complaint, once it is ruled non-frivolous. The response must be filed within 30 days after the IEC has notified the respondent that the complaint was found to be non-frivolous, unless the IEC grants an extension [IEC Rule 7(K)].
- **CONDUCT AN INVESTIGATION.** IEC Staff must conduct an investigation and provide an investigation report to the parties at least 10 days before the hearing date for non-frivolous complaints [Article 29, Section 5, and IEC Rule 7(I) and (J)].
- **PROVIDE NOTICE OF THE HEARING.** The IEC must provide the parties with a notice of the hearing date for non-frivolous complaints and must allow the parties to inspect any non-confidential documents related to the hearing [IEC Rule 8(B)].
- **ISSUE A DECISION.** The IEC must issue a final decision for all non-frivolous complaints, provide a copy of the decision to the parties to the complaint, and post the decision to its website at the earliest practicable time [IEC Rule 8(H)].

## WHAT PROBLEM DID THE AUDIT WORK IDENTIFY AND WHY DID IT OCCUR?

We found that the IEC could improve the consistency of its process and has not provided the public with adequate information regarding its interpretation of Article 29 and statute, which it believes to be in conflict.

First, we identified two key areas where the IEC's process was not consistent from one complaint to the next.

- For three of the seven non-frivolous complaints we reviewed, we found that the IEC lacked documentation showing that it provided the parties with notice of the specific standards of conduct and potential ethical violations it planned to consider at the hearing. For the four other complaints, the IEC did provide this notice, providing the specific laws or standards that may have been violated. IEC Rules and policies do not require the IEC to provide this notice to parties and thus, it lacks a consistent standard to follow for each complaint.
  
- Although some form of investigation was conducted for each non-frivolous complaint, the investigative reports were not consistent in their content and scope. Specifically, three of the investigative reports primarily confirmed that the facts submitted by the parties to the complaint were true and did not attempt to draw any conclusions as to whether any ethical violations had occurred. Three other investigative reports confirmed the facts of the complaint and also provided a legal analysis and recommendation to the IEC regarding how it should rule on the complaints. The remaining report consisted solely of transcripts of a series of interviews with witnesses and the respondent, and provided no additional analysis. These inconsistencies appear to have occurred because the IEC has not established any rules or guidelines regarding the content of its investigations.

Second, we found that the IEC did not dismiss two complaints that Section 24-18.5-101(5), C.R.S., requires to be dismissed. Specifically, neither of these complaints alleged that the respondent received a thing of value that was provided to influence an official action. One of the cases involved an alleged misuse of state funds, and the other involved the respondent's alleged embezzlement. In each case, the officials were alleged to have improperly acquired the benefit they received on their own accord, through their own actions, and thus, the benefit that was alleged to have been improperly received was not a gift nor was it received to influence an official action.

According to both the IEC Director and the IEC's Attorney General's Office representative, under Article 29, Section 5(1), the IEC has broad authority to decide complaints regarding any standards of conduct applicable to state and local government employees and elected officials and, as a constitutional provision, Article 29, Section 5(1), overrides the requirement in Section 24-18.5-101(5), C.R.S. Specifically, Article 29 states that in addition to the specific ethical standards established in Article 29, the IEC may hear complaints under "any other standards of conduct or reporting requirements as provided by law." Thus, although the IEC's practice is to stay complaints where there is also a pending criminal complaint until the criminal case is concluded, based on the broad language in Article 29, it has considered complaints that allege criminal violations such as embezzlement, to be within its jurisdiction. However, there has not been a court decision confirming this interpretation of law and the IEC does not provide information on this interpretation of its authority on its website to ensure that the public understands its practices.

## WHY DOES THIS PROBLEM MATTER?

Because the IEC does not require complainants to provide specific ethical standards that they allege to have been violated in their complaints, and at times bases its decisions on standards that are not specifically referenced in the complaint, without notice from the IEC, respondents may not fully understand the allegations against them and

may be hindered in their ability to prepare a response. Further, if the parties to the complaint are not properly informed of the scope of the hearing, it may increase the likelihood of appeals. Because for each of the three complaints we identified, the respondents provided adequate responses and the IEC ruled that no ethical violation occurred, it did not appear that this issue impacted the IEC's final decisions, nor did it lead to appeals of these complaints.

It is important that the IEC establish clear guidelines for its Director in preparing investigative reports because the reports are a key part of the IEC process for verifying the accuracy of the facts presented and collecting information that may have been omitted by the parties to the complaint. By providing the Director with clear guidance regarding the investigation process, the IEC can ensure consistency and ensure it has the information necessary to assess each complaint.

It is also important that the IEC inform the public of its interpretation of Article 29, Section 5(1), as providing authority to hear complaints beyond the scope provided in Section 24-18.5-101(5), C.R.S., to ensure that parties to complaints, and the public, understand its jurisdiction and why it does not dismiss complaints under Section 24-18.5-101(5), C.R.S.

## RECOMMENDATION 3

The Independent Ethics Commission (IEC) should establish procedures to ensure that:

- A Parties to the complaint receive notice of the specific ethical standards the IEC plans to consider at the hearing, to determine whether an ethical violation has occurred.
- B IEC staff document the steps taken to provide the notice provided in PART A.
- C IEC staff have clear guidelines regarding the scope and contents of its investigative reports.

## RESPONSE

### INDEPENDENT ETHICS COMMISSION

- A AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.
- B AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.
- C AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.

**AUDITOR'S NOTE:** The responses above are the complete responses of the Independent Ethics Commission.

## RECOMMENDATION 4

The Independent Ethics Commission (IEC) should provide information to the public explaining its interpretation and application of Article 29 of the State Constitution as providing it with authority to hear complaints beyond the limitations of Section 24-18.5-101(5), C.R.S.

## RESPONSE

### INDEPENDENT ETHICS COMMISSION

AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.

**AUDITOR'S NOTE:** The response above is the complete response of the Independent Ethics Commission.

# DOCUMENT RETENTION

In conducting its business and hearing complaints, the IEC receives and generates a wide variety of records. For complaints, these records include the complaint, evidence in support of the complaint, the respondent's response, motions filed by the parties, correspondence between the parties and the IEC, the IEC's investigative report, meeting minutes, postings on the IEC website, and the final order providing the IEC's decision on the complaint. For advisory opinions and letter rulings, the records include the request, correspondence, supporting documents, and the final ruling. In addition, all IEC meetings and hearings, including the parts of the meeting held in executive session, are tape-recorded. Although the IEC keeps minutes providing a broad summary of activities that occurred during the portions of the meeting open to the public, the IEC does not prepare any transcripts of meetings or hearings and the audio recordings are the official record of the proceeding.

Some of the records, such as non-frivolous complaint forms and written final orders on complaints, are made available by the IEC on its website. Other records, such as those related to frivolous complaints, must be held confidential by the IEC. In addition, some records are not proactively shared with the public, but are available for public inspection through Colorado Open Records Act requests. To manage its records, the IEC created a Records Management Policy in January 2015, which outlines the records to be maintained on its website and provides time periods for retention of records. Prior to January 2015, the IEC did not have a written policy on records management and retention.



## WHAT WAS THE PURPOSE OF THE AUDIT WORK AND WHAT WORK WAS PERFORMED?

The purpose of the audit work was to determine whether the IEC adequately maintains records of its complaint and formal advice processes. To conduct our work, we reviewed all records maintained by the IEC for the 53 complaints submitted from January 2012 through June 2015, and the 24 requests for advisory opinions and letter rulings submitted during Fiscal Year 2015. We also reviewed statutes related to records retention, the IEC's Records Management Policy, and the State Records Management Manual prepared by the State Archives. In addition, we reviewed the information available on the IEC's website, interviewed the IEC Director regarding the IEC's system to retain records related to complaints, and interviewed State Archives staff regarding the process for state agencies to create records management policies.

## HOW WERE THE RESULTS OF THE AUDIT WORK MEASURED?

Statute [Section 24-80-102.7, C.R.S.] requires all state agencies, including boards and commissions, to develop a records management program, including establishing retention and disposition schedules consistent with the procedures established by the Executive Director of the Department of Personnel & Administration, which are administered by its State Archives staff. According to State Archives policy, in order to comply with this requirement, state agencies must work with the State Archives to develop a records retention schedule, which must be approved by the State Archives, the Attorney General's Office, and the State Auditor. In addition, the State Archives publishes a State Records Management Manual that provides guidance to state agencies regarding the retention of numerous types of records. We reviewed whether the IEC followed this process in establishing its records retention policy, and also compared the timelines in its

retention schedule to the timelines provided in the State Records Management Manual.

## WHAT PROBLEM DID THE AUDIT WORK IDENTIFY AND WHY DID IT OCCUR?

We found that the IEC did not adequately retain records of its complaints process. Specifically, for 25 of the 53 complaints we reviewed (47 percent), the IEC could not provide key records, such as the complaint, evidence submitted, and correspondence between parties, as follows:

- For two of the seven non-frivolous complaints we reviewed (29 percent), the IEC could not provide key records. Specifically, for one non-frivolous complaint the IEC Director could not provide the complaint form, and notice of hearing document. For the other complaint, the Director could not provide documentation of the notice to the respondent that the complaint was ruled non-frivolous. According to the IEC Director, these documents were lost prior to her employment with the IEC and its current Records Management Policy, and she did not know why they were not retained.
- For 23 of the 45 frivolous complaints we reviewed (51 percent), the IEC did not retain either the complaint or official correspondence, and for nine of these 23, it had retained no documentation whatsoever. According to the Director, most of the missing records that related to frivolous complaints had been destroyed by the IEC in accordance with its Records Management Policy, instituted in January 2015, which provides for the destruction of records related to frivolous complaints after 1 year.

Further, the IEC only maintained audio recordings of hearings for 10 of 53 complaints included in our review (19 percent). According to the IEC Director, some of these recordings, specifically those pertaining to four non-frivolous complaints, were inadvertently destroyed. However, the IEC's Records Management Policy provides for the

destruction of audio recordings for frivolous complaints after 90 days, so many of the remaining audio recordings for frivolous complaints were destroyed intentionally, in accordance with the IEC's policy.

In addition to the problems we identified regarding missing records, we also found that the IEC does not consistently record and communicate the basis of its frivolous rulings to the public. In addition to providing a dismissal letter to the complainants, the IEC's practice is to publish its decision to dismiss a complaint on its website, only providing a case number and a citation to the rule the complaint was dismissed under, and to record this information in its meeting minutes. We found inconsistencies in the reasons for dismissal provided on the IEC's website, its meeting minutes, and the letters it provided to complainants for seven of the 45 frivolous dismissals included in our review. For example, for four complaints, the meeting minutes published on the IEC's website indicate that a complaint was dismissed under a different rule than the rule cited in the letter provided to complainants. In three other cases, the reason for dismissal on the website does not match the reason provided in the IEC's meeting minutes. Because the IEC lacked recordings of these meetings, we were unable to determine what the actual basis of decision was for these complaints.

Although the IEC's Records Management Policy requires the destruction of all records related to frivolous complaints after 1 year, we found that this policy was not approved by the State Archives, Attorney General, and State Auditor under the procedures established by the State Archives in accordance with Section 24-80-101, et seq. C.R.S. Further, although those policies allow state agencies flexibility to set their own records retention schedules, based on agency needs and the value of the records, the retention schedules provided in the State Records Management Manual provide considerably longer timelines for retention of records related to other similar administrative hearing processes conducted by state agencies than does the IEC's policy. For example, records related to personnel system hearings must be retained for 6 years after the case is closed, and complaint files related to whistleblower, fraud, and criminal

complaints received by state agencies must be retained for 7 years after the final resolution. The manual does not make a distinction based on whether the complaint was determined to be frivolous or otherwise dismissed.

Further, although the IEC's Records Management Policy lists the types of records that should be retained, the IEC has not established written procedures for filing, organizing, storing, and posting records. We found that many of the records files that we reviewed were not consistently organized and maintained. For example, the records lacked consistent labeling conventions, contained numerous subfolders, contained duplicate records, and contained near-duplicate records with no indication of which was the final version.

## WHY DOES THIS PROBLEM MATTER?

The IEC needs to maintain an adequate record of its complaints process to allow it to review prior complaints and decisions, make non-confidential information available to the public, and ensure that it can be audited. First, as the IEC Director and commissioners positions are filled by different individuals over time, having the ability to review past decisions of the IEC can provide consistency and allow the IEC to make improvements to its processes. In addition, if the IEC receives complaints that involve the same parties and similar circumstances, it may be able to improve its investigative process by reviewing prior complaint files, since it may have received evidence relevant to current complaints in the past. If records are destroyed too early, or are not well organized and maintained, needed documents may not be available for review.

Second, the IEC's practice is to post non-frivolous complaints to its website. However, we found that the IEC was not able to post one non-frivolous complaint because it was lost or destroyed. By establishing a written policy regarding the organization and filing of key records, the IEC can better ensure that it can consistently communicate information regarding its processes to the public.

Third, the IEC's lack of documentation limited our ability to audit its processes. As mentioned, due to a lack of documentation we could not fully determine whether the IEC consistently followed its rules over time, or properly conducted hearings for all of the complaints included in our review.

## RECOMMENDATION 5

To ensure the adequate retention and management of its records the Independent Ethics Commission (IEC) should:

- A Work with the State Archives to establish an approved records management policy and retention schedule in accordance with statute.
- B Establish written procedures regarding the specific methods used by the IEC Director to manage complaint files and ensure consistent organization, retention, and posting of records.

## RESPONSE

### INDEPENDENT ETHICS COMMISSION

- A AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.
- B AGREE. IMPLEMENTATION DATE: SEPTEMBER 2016.

**AUDITOR'S NOTE:** The responses above are the complete responses of the Independent Ethics Commission.

# CONFLICTS OF INTEREST

Because its decisions can have a significant impact on the parties to a complaint or request for an advisory opinion or letter ruling, it is essential that the IEC maintains its independence and avoids actions that could create an actual or apparent conflict of interest or the appearance of bias. IEC members are not paid and may have outside employment and other activities outside of their work on the IEC; therefore, there is a potential for members to have a personal interest in a complaint, or have personal or professional relationships with parties to a complaint. Further, because three of the five IEC members are appointed by elected officials and are often former elected officials themselves, there is a potential for an appearance of bias depending on the nature of the complaint and parties involved. To avoid such conflicts, it is the practice of IEC members and its Director to recuse themselves from complaints or other actions where a potential for a conflict of interest or appearance of bias exists.

## WHAT WAS THE PURPOSE OF THE AUDIT WORK AND WHAT WORK WAS PERFORMED?

The purpose of our audit work in this area was to determine whether the IEC has adequate policies and procedures in place to avoid actual or apparent conflicts of interest or bias. We reviewed all available records from complaints received by the IEC from January 2012 through June 2015, and all advisory opinion and letter ruling requests for Fiscal Year 2015. For each complaint or request file, we reviewed available documentation to determine if any evidence of a potential conflict existed, and also reviewed whether IEC members recused themselves from the related proceedings. In addition, we reviewed IEC Rules, statutes, and the Judicial Code of Ethics regarding standards for decision-making bodies when potential conflicts of interest or the appearance of impropriety may exist. We also interviewed all five IEC

commissioners and the Director regarding the IEC's practices for avoiding potential conflicts.

## HOW WERE THE RESULTS OF THE AUDIT WORK MEASURED?

There are several provisions in statute and state policies emphasizing the responsibility of board and commission members, judges, and state employees to act impartially and avoid real conflicts or the appearance of conflicts of interest or bias, including the following:

- Article 18 of Title 24 of the Colorado Revised Statutes requires state employees and public officials, including the IEC and its staff, to comply with a code of ethics and standards of conduct, which includes acting impartially and avoiding real or apparent conflicts of interest.
- The Colorado Code of Judicial Conduct emphasizes that judges and those who act as judges, must avoid impropriety and the appearance of impropriety such as real and apparent conflicts of interest. Although it is not clear whether the Code of Judicial Conduct strictly applies to IEC members, as a quasi-judicial body, the IEC can use this code as a best practice.

## WHAT PROBLEM DID THE AUDIT WORK FIND AND WHY DID IT OCCUR?

We found that the IEC lacks a written policy regarding conflicts of interest and avoiding the appearance of impropriety. Although the IEC commissioners and the Director reported that it has been their practice to recuse themselves when they believe they have a potential conflict of interest or cannot make an impartial decision (and commissioners had done so six times during the proceedings for the 53 complaints we reviewed), the IEC has not established any written policy regarding what situations would require recusal, how potential conflicts should be disclosed, and what procedures the IEC will follow in the case of a



conflict or appearance of bias. For example, there is no guidance about whether IEC commissioners should recuse themselves if they are personally acquainted with a party to a complaint, have donated to a complainant's or respondent's political campaign, were appointed to the IEC by a party to the complaint, or if a more direct interest in a complaint is needed before recusal is required. Because the IEC often hears complaints against elected officials, each of these issues has arisen on complaints and may arise again. Further, the IEC has not determined what procedures it would follow to administer a complaint if its Director, who is the sole employee of the IEC, could not participate due to a conflict.

In addition, the IEC relies on the Attorney General's Office to provide legal counsel and its Attorney General representative is actively involved with IEC proceedings, attending most meetings and frequently providing advice and analysis on both procedural and substantive matters. The Attorney General representative may also encounter the potential for conflicts or the appearance of bias when complaints or requests for advice involve state employees or officials of other state agencies that the representative supports. Although the Attorney General's Office has policies and procedures to avoid conflicts of interest when it represents opposing parties in a proceeding, the IEC should determine when an appearance of a conflict would require the IEC to seek outside counsel. In particular, the IEC has no guidance on what procedures it would follow if the Attorney General or the IEC's Attorney General representative was a complainant or respondent to an ethics complaint.

## WHY DOES THIS PROBLEM MATTER?

A lack of written policies regarding conflicts of interest increases the risk that IEC commissioners, staff, or legal counsel could participate in matters where a conflict of interest exists, and could result in inconsistent practices. Although each commissioner we interviewed understood the need to avoid the appearance of impropriety and recuse themselves when a real or apparent conflict exists, it appeared that commissioners may not all use the same standards to determine

when a recusal is required. For example, some commissioners said that commissioners should recuse themselves if they are personally acquainted with a party to the complaint, while other commissioners indicated that they would only recuse themselves if they had a more direct conflict, such as a financial interest or business relationship with a complainant or respondent. Although each commissioner is ultimately responsible for deciding whether he or she cannot be impartial, a written policy defining the standards the IEC expects its members and staff to follow would set minimum standards and help ensure consistency. Further, establishing procedures for handling conflicts of interest would provide the public with greater transparency and avoid the appearance of impropriety which could occur if the IEC must make a decision regarding its policies on conflicts of interest when a conflict has already arisen in a pending complaint.

## RECOMMENDATION 6

The Independent Ethics Commission should implement a written policy regarding its standards and procedures for handling real and apparent conflicts of interest among commissioners, its Director, and Attorney General's Office counsel. These standards should be made available to the public.

## RESPONSE

### INDEPENDENT ETHICS COMMISSION

AGREE. IMPLEMENTATION DATE: OCTOBER 2016.

**AUDITOR'S NOTE:** The response above is the complete response of the Independent Ethics Commission.

# STAFF POLICIES AND PROCEDURES

As discussed, at the time of our audit, the IEC employed a single individual who served as the IEC Director, although Article 29 allows it to hire additional staff as needed to carry out its duties. The Director at the time of the audit reported having responsibility for the following: administering all aspects of the IEC including complaints, advisory opinions, and letter rulings; document management; training and outreach to state and local government entities; scheduling and facilitating IEC meetings and hearings; managing the IEC website; providing legal analysis to the IEC in consultation with the IEC's Attorney General counsel; training new IEC members; coordinating with the Judicial Department to administer the IEC's budget and finances; and answering informal questions from government employees, the public, and the media. The IEC has had three different directors since it was established in 2006. Following the resignation of its third director in December 2015, the IEC announced the hiring of its fourth director effective March 2016.

## WHAT WAS THE PURPOSE OF THE AUDIT WORK AND WHAT WORK WAS PERFORMED?

The purpose of our audit work was to determine whether the IEC has adequate written policies and procedures for its staff to ensure the consistent administration of the IEC in accordance with Article 29 and IEC Rules. To accomplish this objective, we interviewed the Director at the time of the audit and one former Director regarding their duties during their tenure with the IEC; interviewed IEC members regarding the Director position, duties, and role; reviewed complaint, advisory opinion, and letter ruling files administered by the Director; and reviewed Article 29 and IEC Rules related to the Director's administration of the IEC.

## HOW WERE THE RESULTS OF THE AUDIT WORK MEASURED?

Article 29 and IEC Rules provide only limited guidance on the role of its staff. Specifically, they include the following:

- The General Assembly shall appropriate staff and funds as necessary for the IEC to carry out its duties [Article 29, Section 5(1)].
- IEC staff are responsible for conducting preliminary investigations of complaints prior to the IEC's initial decision, if directed to do so by the IEC [IEC Rule 7(F)].
- IEC staff must conduct an investigation and prepare an investigation report for all complaints that are ruled non-frivolous by the IEC [IEC Rule 7 (I) and (J)].
- The IEC may delegate functions and responsibilities to its Director and staff [IEC Rule 9(C)].
- IEC staff are not permitted to render legal advice, nor can they comment on the validity of a complaint or discuss the substance of any complaint with the parties [IEC Rule 9(C)].

Because Article 29 and IEC Rules do not address many duties of its staff, and do not provide any specific procedures for staff to follow, we expected that the IEC would have controls, such as written policies and procedures, to ensure that its Director administers the IEC consistently and in accordance with applicable law.

## WHAT PROBLEM DID THE AUDIT WORK IDENTIFY?

Overall, we found that the three individuals who have served as the IEC Director have not consistently administered all of the IEC's functions during their tenures, including:

- As discussed in RECOMMENDATION 3, the IEC Directors have not consistently administered some aspects of the complaints process, such as providing notice to parties and conducting investigative reports.
- As discussed in RECOMMENDATION 5, the system for managing records was not the same from one Director to the next. For example, we found that files for two non-frivolous complaints were missing key documents, such as the complaint, response, and correspondence, which had not been retained by a previous Director, while the files for all three non-frivolous complaints administered by the Director at the time of the audit contained these documents.

## WHY DID THIS PROBLEM OCCUR?

We found that at the time of our audit the IEC had not developed any written policies and procedures for its staff to follow in administering the IEC's functions. Because most of the IEC's practices in administrative matters have been developed by the IEC Directors themselves, as the sole employee of the IEC, their practice has been to carry out the administrative functions of the IEC based on their understanding of IEC Rules and ad hoc guidance provided by the IEC commissioners. However, without written policies the IEC cannot ensure that it follows a consistent process for all of its key functions, in particular when it is necessary to hire a new Director. As of February 2016, the IEC was in the process of hiring a new Director and based on our audit work, in December 2015, the previous Director had drafted policies and procedures to provide to that

individual, although these have not been adopted by the IEC commissioners.

## WHY DOES THIS PROBLEM MATTER?

By not ensuring that its staff follow common written practices over time, there is an increased risk that staff will not properly administer the IEC's functions and meet the needs and operational goals of the commissioners. Specifically, as we noted in RECOMMENDATIONS 3 and 5, we found that a lack of clear guidance resulted in some complainants receiving different treatment than others, and records of complaints not being properly maintained. Although we did not review the practices of IEC staff regarding other functions of the IEC, such as providing guidance and training to state and local government agencies, a lack of written policies creates a risk of inconsistent practices in these areas as well.

## RECOMMENDATION 7

The Independent Ethics Commission (IEC) should adopt written policies and procedures for IEC staff to ensure that its staff consistently administer the IEC's functions.

## RESPONSE

### INDEPENDENT ETHICS COMMISSION

AGREE. IMPLEMENTATION DATE: DECEMBER 2016.

The Commission has a new Executive Director who will review draft policies and procedures, refine same and finalize policies and procedures by December, 2016.



# PROGRAM EFFECTIVENESS

According to Article 29, Section 1(1), which provides a declaration of the article's purpose: public officers, members of the General Assembly, local government officials, and government employees, "must hold the respect and confidence of the people...carry out their duties for the benefit of the people of the state, [and] avoid conduct that is in violation of their public trust." The IEC was created to enforce and issue advice on the ethical requirements provided in Article 29 and other ethical standards as provided by law [Article 29, Section 5]. As the only state entity created to administer and enforce the requirements of Article 29, the IEC plays a critical role in fulfilling the law's intent.

## WHAT WAS THE PURPOSE OF THE AUDIT WORK AND WHAT WORK WAS PERFORMED?

The purpose of our work was to evaluate whether the IEC has fulfilled its purpose under Article 29. To conduct our evaluation, we reviewed Article 29, statutes, and IEC Rules; assessed the IEC's procedures for hearing complaints and providing ethics advice; interviewed the IEC Director at the time of the audit, all five commissioners, and a former Director, on the IEC's current procedures and the role of the IEC; and compared the role of the IEC Director to the duties performed by the staff of ethics commissions in other states and local governments to identify practices that may serve as models for the IEC.

## HOW WERE THE RESULTS OF THE AUDIT WORK MEASURED?

According to Article 29, Section 1(1)(e), “to ensure propriety and to preserve public confidence, [public officers, members of the General Assembly, local government officials and government employees] must have the benefit of specific standards to guide their conduct, and of a penalty mechanism to enforce those standards.” In addition, according to information provided in the 2006 Blue Book in support of Amendment 41’s passage, the IEC was intended to provide a central venue for hearing and investigating complaints related to potential ethics violations within state and local government, and to establish a forum for any citizen to file a complaint.

Our audit included evaluating the extent to which the IEC is fulfilling the expectations of the constitutional amendment by:

- Providing a forum for filing complaints that is accessible to any citizen.
- Providing covered individuals with advice and guidance.
- Upholding the public trust through specific ethical standards by providing adequate information on the basis of its decisions and its interpretation of the State’s ethics laws.

## WHAT ISSUE DID THE AUDIT WORK FIND AND WHY DID IT OCCUR?

Overall, our audit work indicates that the IEC functions as a central, independent forum to hear ethics complaints, accepts complaints from any person, and issues ethics advice as required. Nevertheless, in addition to the procedural improvements recommended earlier in the audit report, we found that there may be opportunities for the IEC to be more effective in enforcing the state’s ethics laws by (1) evaluating whether it can provide additional support to complainants to make its complaint process more accessible and (2) improving its

communication with complainants and the public regarding the basis for its decisions when complaints are held to be frivolous.

**COMPLAINANTS MUST PROSECUTE COMPLAINTS.** As the IEC currently operates under statute and rules, complainants are responsible for gathering evidence that a violation occurred, preparing a complaint that identifies the applicable standards of conduct that a respondent has violated, responding to challenges that may be brought forth by the respondent, and presenting the merits of the complaint at a public hearing and in closing arguments. In addition, although complainants may seek counsel to assist with their complaint, complainants must pay their own legal costs. From the complaint forms we reviewed, filed from January 2012 through June 2015, only about 25 percent of complainants were represented by counsel. For the nine complaints where the complainant was represented by counsel, six were ruled frivolous and three non-frivolous. For the 27 complaints filed by complainants without counsel, 22 were ruled frivolous, four non-frivolous, and one was stayed. Further, depending on the nature of the complaint, this process could require that significant time and resources be expended by the complainant. Because the IEC does not have the ability to provide remedies such as reversing decisions made by public officials who improperly received gifts or compensating individuals who may have been financially impacted by ethics violations, some complainants may lack sufficient incentives to carry forward a complaint.

According to the IEC Director at the time of the audit, requiring complainants to manage their complaints through the process is intended to maintain the objectivity of IEC staff. Specifically, because historically the IEC has had only one employee, its Director, it has required that the Director not take an active role in identifying and prosecuting ethics violations since that person is also responsible for administering the complaints process and investigating complaints. According to current commissioners, the IEC has considered the idea of providing complainants with additional support. However, the primary reasons the IEC has placed the burden of prosecuting complaints on the complainant are that having staff take on a more

active role in identifying and prosecuting complaints could compromise the IEC's ability to offer advice and guidance, since individuals may be reluctant to approach the IEC if its staff were also involved in prosecuting complaints. Further, additional staff may not be justified given that the IEC has, on average, ruled on only 17 complaints each year between Calendar Year 2013 and 2015, with most being dismissed as frivolous. In addition, commissioners' indicated that other states' commissions were created in response to significant ethical problems within government in those states, while the IEC was not created to address a specific problem in Colorado. Thus, the commissioners reported that there may not be a need for the IEC to be as large or proactive as commissions in other states. However, some of the commissioners we spoke with favored the IEC staff taking on a more proactive role and thought that the IEC should do more to make the complaints process more accessible for complainants.

Article 29 provides the IEC with authority to establish rules as needed to implement its requirements, and authorizes legislation to facilitate the IEC's operation, although it specifically prohibits the General Assembly from limiting the provisions in Article 29 or the powers of the IEC through legislation [Article 29, Section 5(1) and 9]. To date, neither the General Assembly nor the IEC have established regulatory or statutory provisions for the IEC to take a more active role in prosecuting complaints.

If the General Assembly and the IEC wish to consider a more active policy related to prosecuting complaints, the IEC could look to other states' ethics commissions for guidance. For example according to data we obtained from the National Conference of State Legislatures, 42 states have established 51 ethics commissions, which on average employ 15 staff each, with Colorado being one of only eight state commissions that employ a single full-time equivalent staff member or less. Although the practices of these commissions can vary based on the authorizing legislation in their states, of the 51 commissions, we found that 17 (33 percent) do not prosecute complaints themselves. Further, of these 17, we identified only four that require complainants

to take on an active role in prosecuting the complaint. Instead, a common practice among the 34 commissions that do prosecute complaints is to employ separate staff to administer, investigate, and prosecute complaints and provide advice. In addition, some commissions proactively investigate potential ethics violations and initiate complaints on their own accord, instead of only hearing the complaints filed by complainants. However, these are policy decisions for the consideration of the General Assembly and the IEC.

**THE IEC PROVIDES LIMITED INFORMATION TO COMPLAINANTS ABOUT FRIVOLOUS COMPLAINTS.** Because Article 29, Section 5(3)(b), requires the IEC to maintain the confidentiality of complaints ruled to be frivolous, its practice with respect to frivolous complaints is to only provide complainants with a brief letter stating that their complaint was considered by the IEC and dismissed as frivolous. No other information about the complaints is released by the IEC. Typically, the only explanation provided in the letter is a citation of the IEC rule under which the complaint was dismissed. Because the IEC rules articulate broad reasons for dismissing complaints, such as “the complaint is frivolous” and “the IEC has no jurisdiction” a citation to the rule provides little explanation for the IEC’s decision.

This process can be particularly confusing to complainants because the IEC’s rules and practice are not entirely aligned. Specifically:

- IEC Rule 3(A)(5) defines a frivolous complaint as a “complaint filed without a rational argument for the IEC’s involvement based on the facts or law.” However, in practice, the IEC treats any complaint that does not warrant a full investigation and hearing as frivolous. These include not only those that fail to allege an ethics violation or lack credible evidence, but also complaints outside of the IEC’s jurisdiction and those that are not filed in a timely manner.
- IEC Rule 7(G) contains ambiguous language, providing that, “A complaint shall be dismissed by the IEC on one or more of the following grounds: 1. The complaint is frivolous; or 2. The IEC has

no jurisdiction; or 3. The complaint fails to allege that the conduct complained of occurred within twelve months of the filing of the complaint.” However, the IEC’s practice is to consider all complaints that it finds to be outside of its jurisdiction, lacking sufficient evidence to proceed, or untimely, as frivolous.

Further, the IEC applies the term “frivolous” more broadly than its common usage. In other settings, such as under the Colorado Rules of Civil Procedure, the term is used to describe legal actions that are not serious, made in bad faith, or lack any rational argument. Thus, some complaints that the IEC dismisses as frivolous would likely not be considered frivolous in other settings.

According to the IEC Director and commissioners, the IEC developed its current practices for handling complaints that will not be investigated or publicly heard to protect public officials and employees from complaints that lack merit and to protect complainants from possible retribution. For example, if a complaint is initially determined to be non-frivolous and is made public, there may be an unwarranted perception that the complaint has merit and the complaint may be more widely publicized. In addition, the commissioners indicated that the IEC has had difficulty interpreting the requirements of Article 29, which does not define the term “frivolous” or provide any details on the extent to which information can be shared with complainants without violating its confidentiality requirement; commissioners had varying opinions on the amount of information the IEC should, and is allowed to, make public. The term has also not been further defined in statute.

It is important to note that the confidentiality requirement that applies to the IEC does not apply to complainants and we identified four complaints in our review where the complainants actively publicized the complaint prior to the complaint being ruled non-frivolous and while the IEC was required to maintain confidentiality. When this occurs, providing more information on why the IEC dismissed a complaint may help correct any misperceptions regarding the merits of the complaint and the IEC’s reasoning. Further, at least three

complainants from the complaints included in our review responded to the IEC's determination that their complaint was frivolous seeking more information on the IEC's ruling, or challenging the IEC's determination. In one case, which is still pending, the complainant appealed the IEC's ruling to district court. The commissioners indicated that the ruling in this case may provide additional clarity regarding the IEC's process for frivolous complaints.

## WHY DOES THIS ISSUE MATTER?

By considering changes to make the complaints process more accessible to complainants and providing clear direction regarding the sharing of information of frivolous complaints, the IEC may be able to increase its overall effectiveness.

## RECOMMENDATION 8

The Independent Ethics Commission (IEC) should evaluate Article 29 of the Colorado Constitution (Article 29), statute, relevant court decisions, and its rules to determine whether:

- A Providing additional support to complainants by increasing its staffing, changing the role of its staff, or both would improve its effectiveness. If it determines that such changes would improve its effectiveness, the IEC should change its rules and seek legislative changes as necessary.
- B Opportunities exist to increase the transparency of its process for dismissing complaints as frivolous by providing more information to complainants, clarifying its rules, and/or seeking legislation to clarify the information it can provide under Article 29.

## RESPONSE

### INDEPENDENT ETHICS COMMISSION

- A AGREE. IMPLEMENTATION DATE: MAY 2017.

Implement May, 2017, to allow time for possible legislation.

- B AGREE. IMPLEMENTATION DATE: MAY 2017.

**AUDITOR’S NOTE:** The responses above are the complete responses of the Independent Ethics Commission.





